BACHIK ABDUL RAHMAN

v.

PP

COURT OF APPEAL, KUALA LUMPUR
AHMAD FAIRUZ CJ
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
[CRIMINAL APPEAL NO: J-09-28-2003]
15 MARCH 2004

CRIMINAL PROCEDURE: *Sentence - Concurrent or consecutive - Exercise of court's discretion - Facts and circumstances of each case - One-transaction rule - Totality principle - Whether offences related - Cumulative effect of consecutive sentences - Whether amounts to a 'crushing sentence' - Whether balances out against seriousness of offences committed - Protection of society - Rape - Criminal Procedure Code, ss. 282(d), 292*

CRIMINAL PROCEDURE: *Sentence - Plea of guilty - Discount - Whether reduction in sentence automatic - Principles and application - Severity of offence committed - Previous conviction - Public interest - Deterrent sentence - Absence of good defence or other mitigating factors - Whether sessions judge had considered all these factors - Whether High Court should have interfered and reduced term of imprisonment - Whether necessary for Court of Appeal to reinstate sentence originally imposed by sessions judge*

CRIMINAL LAW: *Penal Code - Section 376 - Rape - Sentence of imprisonment - Accused still serving sentence for previous conviction for rape - Whether present sentence to run concurrently with previous sentence - Whether Sessions Court and High Court right in ordering sentences to run consecutively - Criminal Procedure Code, ss. 282(d), 292 - Whether term of imprisonment should be reduced on account of guilty plea*

The accused pleaded guilty to a charge of raping a 10-year-old girl and was convicted and sentenced to 18 years' imprisonment with 12 strokes of whipping. As the accused was already then serving a 16-year sentence of imprisonment for an earlier conviction, the sessions judge ordered the 18-year sentence to take effect, consecutively, after the completion of the earlier term. Aggrieved, the accused appealed to the High Court against the refusal of the sessions judge to order the sentences to run concurrently. The High Court declined to order the sentences to run concurrently but reduced the term of imprisonment from 18 years to 15 years. The accused appealed to the Court of Appeal.

Held (dismissing the appeal)
Per Augustine Paul JCA delivering the judgment of the court:

[1] Section 292 of the Criminal Procedure Code states in no uncertain terms that "When a person who … is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the court awarding the sentence may direct". The exercise of the discretion in determining the date of commencement of a sentence of imprisonment depends on the facts and circumstances of each case; the court will generally be guided by the one-transaction rule and the totality principle. Based on the facts and circumstances of the instant case, the sessions judge was correct in refusing to order the sentences to run concurrently, and the High Court was right in upholding the direction of the sessions judge. Although both the offences were committed in the same manner and were of the same severity, they were unrelated. The cumulative effect of the consecutive sentences might well be 'crushing' upon the accused but this had to be balanced out against the seriousness of the offences he committed and the need to protect young females from him. (pp 578 b, 579 a-c, g, 580 b-e & 582 a-b)

[2] One of the principles in sentencing is that a convicted person should be given a discount for pleading guilty. A reduction of about one third of the sentence that would otherwise have been imposed is normally given. This, however, is not a strict rule and the court may, in the exercise of its discretion, refuse to grant any discount. The severity of the offence or the existence of a previous conviction may outweigh the mitigating effect of the guilty plea; so may the demands of public interest for a deterrent sentence as well as the absence of a good defence or of other mitigating factors. The guilty plea does not automatically entitle the convict to a lesser punishment. In the instant case, the sessions judge had considered all these factors before deciding that the accused's plea of guilty could not operate as a mitigating factor. Hence, the High Court ought not to have interfered and reduced the sentence of imprisonment from 18 years to 15 years. Nevertheless, it was not necessary for the instant court to reinstate the sentence originally imposed by the sessions judge as it would not make a material difference to the consecutive terms the accused would already have to serve. (pp 583 b-h, 584 a-h & 585 a-c)

[Accused's appeal dismissed; invitation by Public Prosecutor to reinstate sentence imposed by sessions judge declined.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Tertuduh mengaku bersalah terhadap tuduhan merogol seorang kanak-kanak perempuan berumur 10 tahun dan telah disabit dan dijatuhkan hukuman 18 tahun penjara serta 12 sebatan. Oleh kerana tertuduh pada waktu itu sedang menjalani hukuman 16 tahun penjara atas satu kesalahan lain, yang arif hakim Mahkamah Sesyen memerintahkan supaya hukuman 18 tahun penjara tersebut berkuatkuasa, secara berasingan, selepas berakirnya tempoh pemenjaraan yang terdahulu itu. Terkilan, tertuduh merayu ke Mahkamah Tinggi terhadap keengganan hakim sesyen memerintahkan supaya hukuman dijalankan secara serentak. Mahkamah Tinggi enggan memerintahkan hukuman secara serentak tetapi mengurangkan tempoh pemenjaraan dari 18 tahun ke 15 tahun. Perayu merayu seterusnya ke Mahkamah Rayuan.

Diputuskan (menolak rayuan)
Oleh Augustine Paul HMR menyampaikan penghakiman mahkamah:

[1] Seksyen 292 Kanun Prosedur Jenayah menyatakan dengan jelas bahawa "Apabila seseorang yang ... sedang menjalani sesuatu hukuman, dihukum penjara, pemenjaraan itu hendaklah bermula sebaik sahaja atau ketika tamat tempoh pemenjaraan yang ianya sebelum itu dihukum, sebagaimana yang diarahkan oleh mahkamah yang mengawardkan hukuman itu". Pelaksanaan budibicara berkaitan penetapan tarikh mula sesuatu hukuman penjara bergantung kepada fakta dan halkeadaan sesuatu kes; pada amnya mahkamah akan berpandukan kepada kaedah satu-transaksi dan prinsip keseluruhan. Berdasarkan fakta dan halkeadaan kes semasa, hakim sesyen betul bilamana enggan memerintahkan hukuman berjalan secara berasingan, dan Mahkamah Tinggi juga betul kerana mengesahkan keputusan hakim sesyen itu. Walaupun kedua-dua kesalahan melibatkan cara perlakuan yang sama, dan seimbang seriusnya, kedua-duanya tidak berkaitan antara satu dengan yang lain. Tertuduh mungkin akan 'dihempap' kesan kumulatif hukuman berasingan, namun ianya harus diadili dengan berdasarkan keseriusan kesalahan yang dilakukan dan keperluan untuk melindungi kanak-kanak perempuan darinya.

[2] Salah satu prinsip dalam penghukuman adalah bahawa seseorang yang disabitkan harus diberi diskaun kerana mengaku bersalah. Mengurangkan sepertiga dari hukuman yang sepatutnya dijatuhkan adalah satu kebiasaan. Ini bagaimanapun buklanlah satu kaedah yang ketat dan mahkamah boleh, dalam melaksanakan budibicaranya, menolak dari memberi sebarang diskaun. Keseriusan sesuatu kesalahan atau wujudnya sabitan lampau boleh memadamkan kesan keringanan sesuatu pengakuan bersalah; begitu juga,

kepentingan awam, ketiadaan pembelaan yang kuat serta ketiadaan faktor-faktor keringanan. Dalam kes semasa, hakim sesyen telah mempertimbang semua perkara sebelum memutuskan bahawa pengakuan bersalah tertuduh tidak boleh menjadi satu faktor keringanan. Mahkamah Tinggi, dengan demikian, tidak harus mengganggu dan mengurangkan hukuman pemenjaraan dari 18 tahun ke 15 tahun. Namun begitu, tidaklah perlu bagi mahkamah ini mengekalkan hukuman asal yang dijatuhkan hakim sesyen, kerana ia tidak akan mengakibatkan perbezaan material atas hukuman-hukuman berasingan yang perlu dijalani oleh tertuduh.

Rayuan tertuduh ditolak; jemputan Pendakwa Raya supaya mahkamah mengekalkan hukuman asal hakim sesyen ditolak.]

Case(s) referred to:

Amrita Lal Hazra v. Emperor 42 Cal 957 ***(refd)***
Ang Chai Seng v. PP [2000] 1 CLJ 213 CA ***(refd)***
Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
Chin Choy v. PP [1955] MLJ 236 ***(refd)***
Christopher Khoo Ewe Cheng v. PP [1998] 3 CLJ 705 CA ***(refd)***
Crowley and Garner v. R [1991] 55 A Crim R 201 ***(refd)***
Jayaraman & Ors v. PP [1979] 2 MLJ 88 ***(refd)***
Kanagasuntharam v. PP [1992] 1 SLR 81 ***(refd)***
Lee Say & Ors v. PP [1985] 2 CLJ 155 ***(refd)***
Leigh Nicholas Donnelly v. R [1997] 91 A Crim R 550 ***(refd)***
Loh Hock Seng & Anor v. PP [1980] 2 MLJ 13 ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
Ooi Sim Yim v. PP [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223 SC ***(refd)***
PP v. Govindnan Chinden Nair [1998] 2 CLJ 370 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Low Kok Wai [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268 HC ***(refd)***
PP v. Muhari Mohd Jani & Anor [1999] 8 CLJ 430 HC ***(refd)***
PP v. Dato' Nallakaruppan Solaimalai [1999] 2 CLJ 596 HC ***(refd)***
PP v. Oo Leng Swee & Ors [1981] 1 MLJ 247 ***(refd)***
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***
PP v. Sulaiman Ahmad [1993] 1 MLJ 74 ***(refd)***
PP v. Tia Ah Leng [2000] 5 CLJ 614 HC ***(refd)***
R v. Saleem [1964] Crim LR 482 ***(refd)***
R v. Walsh [1965] Crim LR 248 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Shafruddin Selengka v. PP [1994] 4 CLJ 762 HC ***(refd)***
Sim Gek Yong v. PP [1995] 1 SLR 537 ***(refd)***

Sim Yeow Seng v. PP [1995] 3 SLR 44 ***(refd)***
Tan Lay Chen v. PP [2000] 4 CLJ 492 HC ***(refd)***
Vaitos v. R [1981] 4 A Crim R 238 ***(refd)***
Wong Kai Chuen Philip v. PP [1991] 1 MLJ 321 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, ss. 282(d), 292(1), (2)

Other source(s) referred to:
DA Thomas, *Principles of Sentencing*, 2nd edn, pp 57-58
Emmins on Sentencing, 2nd edn, p 151
Sarkar on Criminal Procedure, 7th edn, p 1251

Appellant in person
For the respondent - Tengku Amir Zaki Tengku Abdul Rahman DPP

[Appeal from High Court, Muar; Criminal Appeal No: 42-2-2003]

Reported by Gan Peng Chiang

JUDGMENT

Augustine Paul JCA:

The accused was charged with an offence of rape in the Sessions Court at Muar. The charge reads as follows:

> Bahawa kamu pada 19.9.2001, di antara jam 6.45 petang hingga 8.45 malam di kawasan Kebun Kelapa Sawit Ladang Felcra, Bt 19, Air Hitam, Muar, di dalam daerah Muar, di dalam Negeri Johor telah merogol seorang kanak-kanak perempuan Melayu bernama Rabaitul Adawiyah bt Sulaiman (Tarikh Lahir 29 Januari 1990). Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 376 Kanun Keseksaan.

The accused pleaded guilty. On 14 January 2003 the Sessions Court imposed a sentence of 18 years' imprisonment and 12 strokes of the rotan. The sentence was ordered to take effect consecutively to another term of imprisonment of 16 years that the accused was then serving. It was also for an offence of rape which was committed on 14 October 2001. It must be observed that that offence was committed subsequent to the offence in the present charge though it was disposed off earlier on 19 September 2002. The Sessions Court refused an application by the accused to order the sentence imposed in this case to run concurrently with the earlier sentence. The accused appealed to the High Court against that order. Having rejected this part of the appeal the High Court proceeded to reduce the term of imprisonment to 15 years on the ground that

the Sessions Court had failed to consider the guilty plea of the accused. The accused appealed to this court for an order that both jail terms be made concurrent.

The facts of the case reveal that on 19 September 2001 at about 6.45pm the complainant, a schoolgirl aged eleven, was riding a bicycle in Parit Sulong. The accused, who was driving a motor car, knocked into her from behind. She fell down and suffered some injuries. The accused asked her to get into his car so that he could help her. She refused. The accused then pulled her into his car and drove to an oil palm estate at Ladang Felcra, Batu 19, Air Hitam, Muar. There he came out of the car and went to the back seat. He took off the clothes of the complainant and raped her. The accused then dropped her near Parit Sulong. Medical evidence showed that the complainant had a fresh tear in the hymen. The facts of the case in respect of which the accused had already been convicted was similar. The accused had also forcibly abducted the victim from the road and had raped her.

The learned judge dealt correctly with the appeal of the accused in relation to the date of commencement of the jail term in this case. The commencement of a sentence of imprisonment is governed by s. 282(d) and s. 292 of the Criminal Procedure Code ("s. 282(d)" and "s. 292" respectively). They read as follows:

Section 282
With regard to sentences of imprisonment the following provisions shall be followed:

(a) …

(b) …

(c) …

(d) every sentence of imprisonment shall take effect from the date on which it was passed unless the court passing the sentence otherwise directs.

Section 292

(1) When a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the court awarding the sentence may direct.

(2) A sentence of death shall be executed notwithstanding the pendency of any sentence of imprisonment.

(3) Nothing in subsection (1) shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

Section 282(d) prescribes the general rule that a sentence of imprisonment shall take effect from the date on which it was passed unless the court passing the sentence otherwise directs. Section 292 is a specific provision dealing with the date of commencement of a sentence of imprisonment of a person who is already undergoing imprisonment. Under this section the court may order the imprisonment to commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced. An order that the subsequent prison term is to start immediately does not negate s. 292(2) as adverted to in *Shafruddin bin Selengka v. PP* [1994] 4 CLJ 762. It is expressly authorised by s. 292(1) and what is prohibited is only that the term of imprisonment cannot commence at any point of time prior to the date of conviction. To that extent it cannot be concurrent to a prison term being served but will be part-concurrent. The object of s. 292(2) can be discerned upon a ratiocination of the phrase "undergoing a sentence of imprisonment" in s. 292(1). This is explained in *Sarkar on Criminal Procedure*, 7th edn at p. 1251 in the following terms:

> A person sentenced to imprisonment must, for the purpose of s. 427, be deemed to be undergoing that sentence from the very moment the sentence is passed. The accused may be on bail or in custody in the earlier case at the time of passing of the subsequent sentence. Literal construction of the terminology 'undergoing a sentence of imprisonment' would lead to absurd results especially where two separate sentences are awarded one after the other on one day in two separate trials. Either the Judge would not exercise the discretion only because in earlier case (the) convicted (person) had not gone inside the jail by that time or he will have to actually send the convict inside the jail some time and call him back immediately to pronounce judgment in the second case. Such absurd and farcical situation could not be said to have been intended by the legislature (*Sadashiv Chhokha Sabte v. State of Maharashtra* [1993] Cr LJ 1469 (Bom) (DB)).

Section 292(2) resolves the problem identified in the above passage. Pursuant to the subsection where a person is, say, on bail in respect of a prison term and is sentenced to imprisonment with immediate effect to another prison term for a subsequent conviction he will not thereby be excused from any part of the punishment to which he is liable upon his former conviction.

The combined effect of s. 282 and s. 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v. PP* [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v. Saleem* [1964] Crim LR 482; *R v. Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v. PP* [1979] 2 MLJ 88; *Amrita Lal Hazra v. Emperor* 42 Cal 957; *Chin Choy v. PP* [1955] MLJ 236). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v. PP* [1992] 1 SLR 81 at p. 83:

> The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v. Faulkner* [1972] 56 Cr App R 594, *R v. Wheatley* [1983] 5 Cr App R (S) 417 and *R v. Skinner* (1986) 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

In explaining the totality principle his Lordship referred (at p. 85) to the view of DA Thomas in *Principles of Sentencing,* 2nd edn at pp. 57-58:

> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his record and prospects.

In this regard reference is also made to *Emmins on Sentencing,* 2nd edn, p. 151:

> It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.

There will be cases properly described as crushing the hope in the offender of reformation and a return to a desirable life but in which the offender has, by his criminal acts, forfeited any right to have his sentence reduced on that account (see *Crowley and Garner v. R* [1991] 55 A Crim R 201). As O'Bryan J said in *Vaitos v. R* [1981] 4 A Crim R 238 at p. 301:

> I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour.

Young CJ said in that case that the question of whether the sentence imposed is crushing cannot be answered mathematically by reference to the offender's age and the length of sentence to be served but by the circumstances of the case.

The judgment of the learned Sessions Court Judge illuminates the reasons that compelled him to order the sentence of imprisonment to be consecutive to the punishment imposed in respect of the previous offence. In this regard the learned Sessions Court judge said in his grounds of judgment:

> Dari fakta yang dinyatakan tadi adalah amat jelas bahawa hukuman yang paling berat mestilah dikenakan terhadap OKT kerana perbuatan OKT yang tanpa belas kasihan telah sanggup merogol seorang kanak-kanak yang begitu muda berumur hanya 11 tahun.
>
> Bukan itu saja, OKT yang berumur 28 tahun telah mengambil kesempatan dan juga melakukan keganasan fisikal terhadap mangsa yang jauh lebih lemah dari segi fisikal. Di dalam rayuannya OKT memohon supaya hukuman berjalan serentak dengan hukuman yang sedang dijalankan sekarang. Menurutnya, beliau telah insaf dan tidak akan mengulangi perbuatan ini dan juga merayu kerana sudah dikenakan hukuman sebatan yang agak banyak dalam kes terdahulu.

Walaupun pengakuan bersalah OKT telah dapat menjimatkan masa dan perbelanjaan Mahkamah tetapi dalam kes-kes yang melibatkan mangsa yang dirogol berumur di bawah 16 tahun maka kepentingan awam melampaui kepentingan individu. Kepentingan awam memerlukan kesalahan begini dipandang berat dan mewajarkan supaya suatu hukuman yang maksima sebagai pengajaran dan teladan kepada masyarakat. Mahkamah bersetuju terhadap cadangan Timbalan Pendakwa Raya yang mengesa supaya hukuman berat dijatuhkan kerana perbuatan sebegini amat berleluasa dan kesannya melibatkan trauma kepada mangsa yang sepatutnya mempunyai masa depan yang cerah.

Mahkamah juga mengambil maklum bahawa OKT sedang menjalani hukuman bagi kes rogol yang lain dimana Mahkamah telah menjatuhkan hukuman 16 tahun penjara dan 8 kali sebatan rotan. Pada pandangan Mahkamah nampaknya penglibatan OKT di dalam jenayah adalah lebih kepada kesalahan seksual yang kejam. OKT sekiranya tidak dibendung perbuatannya ini dari awal lagi maka kemungkinan besar beliau akan melakukan kesalahan yang sama terhadap mangsa-mangsa yang berlainan pada masa hadapan. Oleh itu amatlah berbahaya sekali kepada masyarakat umum sekiranya penjenayah seperti OKT ini diteruskan untuk bergaul di kalangan masyarakat umum kerana beliau mempunyai keupayaan dan potensi untuk melakukan kesalahan ini beberapa kali pada masa depan dengan akibat yang lebih teruk kepada mangsa-mangsanya. Tidaklah keterlaluan sekiranya Mahkamah menganggap OKT mempunyai ciri-ciri seorang perogol bersiri (serial rapist) yang menjadi masalah besar kepada polis dan ketenteraman awam pada masa kini.

In agreeing with the views expressed the learned judge said in pp. 10-11 of his judgment:

Those comments were strong, but were not without reasonable basis. Rape is a heinous crime which must be severely punished. And in the case of both rapes committed by the Appellant, they were most primordial. The Appellant was just a savage. In both cases, he just snatched young and defenceless girls from the streets and raped them. The trial court was not wrong to say that the Appellant was a real threat to the public, and to young girls in particular. The public must be protected. There was certainly good and justifiable reason to order a consecutive sentence. In any event, both offences were unrelated. A concurrent term of imprisonment would effectively result in the Appellant not being imprisoned at all for the second offence. And that would not do any justice to the instant victim who would surely have to bear forever the ugly memory of rape, if not any of the undeserved stigma of rape. Each rape must be punished. This is certainly not a case to disturb the order of a consecutive sentence.

It must be remembered that both the offences were executed in the same manner and are of the same severity and are unrelated. It cannot be denied that the cumulative effect of both the sentences will have a crushing effect on the accused bearing in mind his age. But this effect must be balanced against the seriousness of the offences committed by him and the need to protect young females from him. The order made by the High Court in upholding the direction of the Sessions Court on the commencement of the jail term imposed in this case is therefore correct in law and we are unable to interfere.

We consider it necessary to deal with the reduction of the sentence imposed on the accused to 15 years by the High Court. The learned judge first enumerated the circumstances in which an appellate court may interfere with a sentence that had been passed. As he said in p. 3 of his judgment:

> … the appellate court is ready to interfere with the sentence imposed by the trial court upon proof of one or more of the following circumstances: (a) The sentence imposed by the trial court was manifestly excessive or inadequate. (b) There is a manifest error either in law or in considering the facts and circumstances of the case. (c) The sentence passed by the trial court is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. (d) The trial court has given undue weight to some of the evidence. (e) The trial court, in fixing the sentence, had failed to adequately consider all the relevant factors either for or against the offender. (f) The sentence was wrong in law. (g) The unsatisfactory features of the proceedings in the lower court. (h) The charge has been hanging over the accused's head for a considerable period. (i) Justice does not appear to have been done. (*Civil and Criminal Appeals in Malaysia* by Tan Kee Heng at pages 191-192)

He then referred to *Ang Chai Seng v. PP* [2000] 1 CLJ 213; *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 and *Bhandulananda Jayatilake v. PP* [1982] 1 MLJ 83 which support the proposition that an appellate court will not alter a sentence merely because it might have passed a different sentence. The learned judge then referred to *Sau Soo Kim v. PP* [1975] 2 MLJ 134; *PP v. Ravindran & Ors* [1993] 1 MLJ 45 and *Mohamed Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 which dealt with the credit that should be given to a guilty plea. In holding that the Sessions Court had not adhered to this rule he said in p. 8 of his judgment:

> If there had not been a plea of guilty but a finding of guilt after trial, 20 years was the maximum term of imprisonment that could have been imposed. If 20 years would have been the term of imprisonment, then at the most, on account of the plea of guilty, the Appellant could only be sentenced to a term of imprisonment of 13-15 years. But no credit or discount or no real credit or real discount was given to the Appellant for pleading guilty. As a matter

> of fact, the subject of credit or discount for pleading guilty was somehow forgotten altogether. And that lapse should be put right. The term of imprisonment is therefore reduced to 15 years, which is three-quarters of the maximum term of imprisonment. The Appellant who appeared in person made out no case deserving anything less.

The learned judge appears to have taken the view that credit should be given in every case where a person pleads guilty. The position in law is that it is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v. PP* [1975] 2 MLJ 134; *PP v. Sulaiman bin Ahmad* [1993] 1 MLJ 74; *PP v. Ravindran & Ors* [1993] 1 MLJ 45). The discount that is given is normally a reduction of the sentence by about a third of what would otherwise have been imposed (see *Mohamad Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; *PP v. Muhari bin Mohd Jani & Anor* [1999] 8 CLJ 430; *Christopher Khoo Ewe Cheng v. PP* [1998] 3 CLJ 705). However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v. PP* [1996] 4 CLJ 441; *Lee Say & Ors v. PP* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683). Its application in favour of an accused depends on the facts and circumstances of each case (see *Wong Kai Chuen Philip v. PP* [1991] 1 MLJ 321). Thus, as lucidly explained by Charles JA in *Leigh Nicholas Donnelly v. R* [1997] 91 A Crim R 550 at p. 554:

> A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is to be concerned is what weight should be given to it in the circumstances.

The circumstances in which a guilty plea will not have any weight are varied. The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng & Anor v. PP* [1980] 2 MLJ 13; *PP v. Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v. PP* [1995] 1 SLR 537; *PP v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370). A guilty plea cannot also be a powerful mitigating factor when effectively no defence to the charge is available to the accused (see *PP v. Low Kok Wai* [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268). If a plea of guilty is made too late in the trial it may also cease to have mitigating effect (see *PP v. Dato Nallakaruppan Solaimalai* [1999] 2 CLJ 596). The absence of mitigating factors in favour of the accused like, for instance, the existence of previous convictions may also deprive the guilty plea of its effect. There can therefore be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment (see

PP v. Tia Ah Leng [2000] 5 CLJ 614). Be that as it may, where there is a departure from the general rule the reason for not treating the guilty plea as a mitigating factor must be reflected in the grounds of judgment (see *Tan Lay Chen v. PP* [2000] 4 CLJ 492).

In the light of the law that we have adverted to what requires consideration is whether in the circumstances of this case the guilty plea of the accused ought to have been treated as a mitigating factor in his favour and, if it is not to be so, whether the Sessions Court was aware of it. The relevant part of the judgment of the learned Sessions Court Judge that we have reproduced earlier makes it patently clear that in imposing sentence he had taken into consideration the seriousness of the offence against the background of the physical weakness and age of the victim; the element of public interest to be served; the effect of the crime on the victim; the previous sentence being served by the accused; and the need to protect society from persons like him. We interpolate to add that the sentence that the accused was then serving in respect of a conviction for an offence committed subsequent to the current offence and convicted earlier will rank as a previous conviction. In this regard we refer to *Sim Yeow Seng v. PP* [1995] 3 SLR 44 where Yong Pung How CJ sitting in the High Court said at p. 47:

> The rationale of *PP v. Boon Kiah Kin* [1993] 3 SLR 639 and, indeed, Lowe J's judgment in *R v. Wilson* [1965] VLR 199 is that a sentencing court should have regard to all of the accused's antecedents up to the moment of sentencing because these antecedents reveal his character, his attitudes and the likelihood of rehabilitation. So long as previous convictions are shown to exist, therefore, it does not matter whether they were in respect of offences committed before or subsequent to the offence for which the court is considering sentence.

The learned Sessions Court Judge had also referred to the effect of a guilty plea and had gone on to explain why it cannot operate as a mitigating factor in this case. It is therefore not appropriate to say that the Sessions Court had "somehow forgotten altogether" the effect of a guilty plea. As the Sessions Court Judge had acted properly in imposing the sentence that he did it ought not to have been disturbed by the High Court.

There was, however, no appeal by the Public Prosecutor against the reduction of the sentence by the High Court. The learned Deputy Public Prosecutor invited us to reinstate the sentence imposed by the Sessions Court pursuant to s. 60 of the Courts of Judicature Act 1964. This is a matter where the Public Prosecutor could have appealed but did not do so. It is our view that in such a situation the exercise of discretion under this provision of law is only appropriate upon sufficient cause being shown for the failure to appeal. This

was not done. This, however, does not preclude the court from acting on its own motion where it is desirable to do so in the interests of justice. The facts of this case did not warrant such an intervention by us. In arriving at our decision we took into account the total of the two consecutive jail terms that the accused has to serve in accordance with the totality principle. While we are not prepared to say that the total of 34 years' imprisonment that the accused would have had to serve, if not reduced by three years by the High Court, is certainly not too much bearing in mind the similarity of the system in which both the offences were carried out we were of the view that the reinstatement of the three years' imprisonment will not make a material difference to the 31 years' imprisonment that the accused already has to serve. Accordingly we declined to accede to the invitation of the learned Deputy Public Prosecutor.

In the upshot we dismissed the appeal.